



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

-----X
DELAWARE DEPARTMENT OF :
NATURAL RESOURCES & :
ENVIRONMENTAL CONTROL, :
an Administrative :
Agency for the State of :
Delaware, :
:
Plaintiff, : ID No. S18M-06-002 RFS
:
v. :
:
MOUNTAIRE FARMS OF :
DELAWARE INC., a :
Delaware Corporation, :
:
Defendant. :
-----X

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Tuesday, November 20, 2018

The above-entitled matter was scheduled for
hearing in open court at 10:00 a.m.

BEFORE:

THE HONORABLE RICHARD F. STOKES, JUDGE.

APPEARANCES:

DEVERA B. SCOTT and WILLIAM KASSAB,
Deputy Attorney Generals, appearing on
behalf of the Plaintiff.

THOMAS C. CRUMLAR, ESQ., appearing on
behalf of the Plaintiff, Balback.

ANNE L. SWOYER, RPR, CCR
OFFICIAL COURT REPORTER



APPEARANCES CONTINUED..

CHASE T. BROCKSTEDT, ESQ., and PHILIP C.
FEDERICO, ESQ., appearing on behalf of
the Plaintiffs, Gary and Anna-Marie
Cuppels.

CHRIS NIDEL, ESQ., appearing on behalf
of the Proposed Interveners.

MICHAEL W. ARRINGTON, ESQ., appearing on
behalf of the Defendant.

ANNE L. SWOYER, RPR, CCR
OFFICIAL COURT REPORTER



P R O C E E D I N G S

THE COURT: Are we ready on our civil side?

So we have the various motions to intervene. We have oral argument at this point in time. I have an application for a motion, admission pro hac vice, from Jacobs & Crumplar on behalf of Chris -- is it Nidel?

MR. CRUMPLAR: Nidel.

THE COURT: Good morning. How are you?

MR. CRUMPLAR: Thomas Crumplar. I represent what's known as the Balback plaintiffs. That's an individual lawsuit.

Chris Nidel is right here. I understand there is no opposition. With Your Honor's permission, we would like him to argue.

THE COURT: Yes. That's probably the last time I will hear no opposition.

MR. CRUMPLAR: Just by way of intervention, Mr. Nidel is based in Washington DC. He's an environmental lawyer. He's been practicing almost 15 years doing that. He's represented probably over a thousand individual



1 plaintiffs and appeared throughout the country
2 in both levels of courts in class actions as
3 well as individual cases. And he's done
4 interventions such as this. I hope his
5 expertise and experience will be helpful to the
6 Court.

7 THE COURT: Thank you very much. And
8 welcome, sir. We'll sign the order. I will
9 pass this back to you.

10 Very well, I've read all of the
11 submissions and also reviewed all the exhibits.
12 So this is the time for oral argument. So the
13 way this would proceed, we will hear from the
14 people applying to intervene first.

15 MR. BROCKSTEDT: Good morning, Your
16 Honor. It's good to see you.

17 THE COURT: It's good to see you and
18 other counsel.

19 MR. BROCKSTEDT: May it please the
20 Court, Chase Brockstedt of the law firm Baird
21 Mandalas Brockstedt. I would like to introduce
22 the Court to my co-counsel, Phil Federico, with
23 the firm Schochor, Federico and Staton.



1 And, Your Honor, together we represent
2 Gary and Anna-Marie Cuppels, who are the
3 plaintiff interveners. But we also represent
4 more than 750 people who have been harmed by the
5 wrongful discharge of highly contaminated
6 wastewater and toxic air emissions from the
7 Mountaire facility.

8 These folks cannot drink the water from
9 their wells. They live in fear every time they
10 use this water to cook their food. They're
11 scared to take a shower and bathe their
12 children. They can't breathe the air inside
13 their homes and they can't open their windows.

14 They are suffering the health effects
15 from the chronic exposure to nitrogen and other
16 contaminants and the emissions from Mountaire's
17 open air septic tanks, and they have suffered
18 property damage. And all of this has been at
19 the hands of Mountaire.

20 These are people with limited resources
21 and no options. Quite simply, they are stuck
22 and they need our help.

23 So why are we here today? DNREC and



1 Mountaire are asking this Court to rubber stamp
2 a settlement agreement that will have far
3 reaching effects. It will resolve the state
4 court action. It will dispose of a federal
5 court litigation.

6 And, importantly, Your Honor, it will
7 create an order from this Court that fails to
8 address the causes of groundwater contamination
9 and air emission. It doesn't protect our
10 clients. It doesn't require Mountaire to clean
11 up its mess and comply with the law. It impairs
12 and impedes plaintiff interveners' rights and
13 interest without public participation or
14 comment. It will cause irreparable harm.

15 And I think, most importantly, Your
16 Honor, it will completely release Mountaire from
17 all past liability going back to its purchase of
18 the plant in 2000 and all future liability until
19 some unknowable and unknown date and time at
20 which Mountaire tells DNREC that it has reached
21 substantial compliance with the settlement
22 agreement.

23 THE COURT: This is Paragraph 61?



1 MR. BROCKSTEDT: That's correct, Your
2 Honor.

3 We have two options, Your Honor. One is
4 that this case and this court can be stayed.
5 And we can deal with what I'm going to talk to
6 you about are the federal claims in federal
7 court. Or plaintiffs should be, plaintiff
8 interveners should be allowed to intervene in
9 this matter under Rule 24.

10 THE COURT: Not to get you off the train
11 track. I apologize. But one of the arguments I
12 think made by Mountaire was that this is
13 exclusively state and nothing federal. What is
14 your position on that? You've just triggered
15 that thought when you were talking about your
16 federal claims.

17 MR. BROCKSTEDT: I'm glad you asked
18 that, Your Honor. Can I explain some context?
19 And then I'm going to answer your direct
20 question.

21 THE COURT: I'll tell you what; I'm
22 going to try to remain silent.

23 MR. BROCKSTEDT: No, no, no. That's



1 okay.

2 DNREC's actions with Mountaire's
3 cooperation in this case have been deliberate.
4 Okay? They filed a federal court case after
5 having pre-negotiated a settlement agreement, a
6 sweetheart deal as we call it.

7 So they filed two complaints. They
8 filed one in federal court and one in state
9 court. And immediately thereafter, they filed a
10 proposed settlement agreement in this court. So
11 before I get to the answer on state claims and
12 jurisdiction and federal claims, Your Honor,
13 you've got to ask yourself, why the two
14 lawsuits. Why did they have to file two
15 lawsuits?

16 So plaintiff interveners provided
17 Mountaire and DNREC with notice of their intent
18 to sue in federal court, which was a statutory
19 requirement. And, basically, once that notice
20 was filed, DNREC had two options. They could
21 let the time period expire and plaintiff
22 intervenors could go ahead and file their
23 lawsuit in federal court or they could file



1 their own lawsuit. And they chose the latter.

2 And so what they did in federal court,
3 Your Honor, was they filed a federal court
4 complaint alleging federal court actions under
5 the Resource Conservation and Recovery Act,
6 known as RCRA, and the Clean Water Act known as
7 the CWA.

8 At the same time, they filed a complaint
9 in state court. And the reason they did that is
10 because they knew that plaintiff interveners
11 have an easier road to intervene in the federal
12 court case.

13 THE COURT: That's the statute.

14 MR. BROCKSTEDT: That's correct,
15 absolute right to intervene.

16 THE COURT: And that statute is in the
17 Clean Water Act?

18 MR. BROCKSTEDT: That's correct.

19 THE COURT: And the other act, the
20 Resource Conservation and Recovery Act, is there
21 the same --

22 MR. BROCKSTEDT: There is also a right
23 to intervene there too, Your Honor.



1 THE COURT: Statutory?

2 MR. BROCKSTEDT: Yes.

3 THE COURT: So why is it being opposed
4 in the federal court by the state?

5 MR. BROCKSTEDT: Not sure. I'm not sure
6 why we're being opposed by DNREC in any
7 situation because they're supposed to be
8 representing the interests of the same people
9 that we represent.

10 THE COURT: Well, I guess under Rule
11 24(a), you were talking about the rules of
12 coming in. So we look at Rule 24. 24(a) says
13 one can come in. One of the different
14 requirements, of course, is that there is an
15 interest that's going to be implicated and is
16 the right to intervene. And the party there is
17 not adequately representing the applicant.

18 Well, with respect to the prong of a
19 right, it would seem for 24(a) purposes -- and
20 we will get to the position of the State in a
21 little bit -- it would seem that there is a
22 right under the Clean Water Act and Resource
23 Conservation Act -- that one too --



1 unconditional to come in to intervene.

2 And the only way they would not come in
3 would be if there was some judgement made that
4 DNREC was not adequately representing the
5 interests.

6 MR. BROCKSTEDT: That's exactly right,
7 Your Honor. That's correct. That's our
8 position.

9 THE COURT: Is that the basis for the
10 opposition for intervention in the federal
11 court? I know it's opposed. I read through all
12 the pleadings and I saw that's opposed.

13 MR. BROCKSTEDT: Yeah. I mean, that's
14 our impression. I mean, I will let Ms. Scott
15 tell you exactly why they are intervening in the
16 federal court. But those are the arguments that
17 they made, Your Honor.

18 But let's go back to the business of why
19 the two lawsuits. And, again, importantly,
20 there wasn't a settlement agreement that was
21 filed in the federal court. It was only filed
22 in the state court.

23 And so they have a problem. And the



1 problem is that they don't want us to be heard
2 DNREC wants to shut the citizens out of the
3 process. And Mountaire wants a pretty quick and
4 easy resolution to this thing without really any
5 teeth.

6 And so what they did was they filed in
7 federal court to block us there. They also
8 filed in state court. And then they filed their
9 settlement agreement.

10 But, Your Honor, they made a critical
11 mistake. And the mistake -- and, again, we can
12 deal with all of these things in the federal
13 court. But if we are talking about sort of the
14 state court handling this proceeding and state
15 court intervention, they made a critical
16 mistake.

17 And the mistake that they made was
18 despite their arguments that it is the plaintiff
19 interveners who are bringing federal court
20 claims and causes of action before this court,
21 it's actually DNREC and Mountaire that have
22 brought the federal court claims.

23 And the way that they have done it is,



1 first, the very state court complaint that DNR
2 filed in this case at Paragraph 3, it defined
3 the wastewater regulations, which include RCRA
4 and the CWA. In Paragraph 5 it talked about the
5 reason why it brought its claims against
6 Mountaire in state court as a result of
7 violations of those wastewater regulations, RCRA
8 and CWA. A little bit of a slight of hand
9 there.

10 But they really tipped their hand with
11 regard to the settlement agreement. Because the
12 settlement agreement expressly resolves federal
13 claims. So let me sort of tell you why.

14 In the federal court complaint, Count 1,
15 they talk about allegations against Mountaire
16 for practices that present, quote, an imminent
17 and substantial danger to human health under
18 RCRA. Count 2, allegations of open dumping,
19 quote, open dumping under RCRA. Count 3 was
20 Clean Water Acts for contamination that is
21 hydro-geologically connected to Swan Creek and
22 Indian River, both waters of the United States
23 under the CWA.



1 So we know what RCRA says. We know wh
2 CWA says. We know what their federal court
3 complaint alleges.

4 Then you turn to their state court
5 settlement agreement. You look at Paragraph 61.
6 And what are they releasing? Okay. Any and all
7 liability for the past or in the future until
8 they reach substantial compliance for, quote,
9 imminent and substantial endangerment to the
10 health of the environment, quote, open dumping
11 and, quote, pollutants going into the surface
12 water that are hydro-geologically connected to
13 Mountaire, from Mountaire to Swan Creek and
14 Indian River.

15 So you've got a complaint in state court
16 that references RCRA and CWA as the wastewater
17 regulations that Mountaire has been violating.
18 And you've got a far-reaching, very broad
19 settlement agreement which completely disposes
20 of those claims.

21 We didn't bring federal claims in this
22 court, Your Honor. We are trying to intervene
23 in a state court action in which DNREC has



1 brought federal claims against Mountaire. And
2 they've come to this court hand in hand asking
3 this court to approve it. So any argument that
4 we are trying to interject federal law into a
5 state court action should be rejected in its
6 entirety. It is not the case.

7 And again, Your Honor, we can go to
8 federal court and we can litigate all these
9 things in federal court. Frankly, no disrespect
10 to this court. It's probably where they should
11 be litigated, I mean, if you ask me. I mean, I
12 think it can go both ways. But if we are not
13 going to be there, then we need to intervene in
14 this court.

15 Your Honor talked a little bit about
16 inadequacy of representation. And that comes
17 from Rule 24. And we can talk about standing
18 and we can talk about some other things as well.
19 But let's sort of go to the question that you
20 raised.

21 Rule 24 allows intervention as a matter
22 of right -- 24(a), rather, allows intervention
23 as a matter of right when the disposition of an



1 action may impair or impede the applicant's
2 ability to protect their interest relating to
3 the subject of the action. If we want to talk
4 about their interest and how the settlement
5 agreement here impairs, impedes, we can do that
6 all day long, Your Honor. I think our papers
7 flush that out pretty well.

8 But talking about the adequacy of
9 representation, there is a couple of points
10 about that which make clear that DNREC is not
11 adequately representing plaintiff interveners or
12 the folks that we represent in Millsboro. They
13 are factual but they are also based in law as
14 well, Your Honor.

15 The EPA can't go around and enforce
16 environmental regulations in every state. They
17 have to use the state agencies to do that. So
18 EPA federally delegates to DNREC the ability to
19 regulate and enforce RCRA and the CWA.

20 But it's not a one-way street. In
21 response to that, DNREC has to agree to certain
22 obligations. They have to make certain promises
23 to the EPA and to the federal government. And



1 one of those promises is that when you have an
2 action just like this, you've got to provide
3 public notice and the ability for the public to
4 comment.

5 THE COURT: Before the settlement.

6 MR. BROCKSTEDT: Correct.

7 THE COURT: Which wasn't done here.

8 MR. BROCKSTEDT: Well, which they are
9 asking this court to do.

10 THE COURT: Was the argument that you
11 were presenting in your brief that this should
12 have been done before filing or
13 contemporaneously with the filing, the notice
14 and the opportunity to be heard?

15 MR. BROCKSTEDT: Prior to even coming to
16 this court with a settlement agreement.

17 THE COURT: Prior to the filing.

18 MR. BROCKSTEDT: Right. And then in
19 addition to that, when you've got intervention,
20 the regulations say, hey, DNREC, you can't
21 oppose intervention if it's permissible by a
22 statute or a rule.

23 So what do we have in this case? There



1 is no notice to the public. And by the way,
2 Your Honor, we reached out to DNREC before they
3 filed their complaint in federal court or state
4 court. And we said, hey, listen, we would like
5 to sit down and talk to you. We wrote to them.
6 We E-mailed them. We had conversations with
7 them.

8 We've said, look, we've got some experts
9 here who, frankly, are some of the best and
10 brightest when it comes to these types of things
11 in the country. We've got an expert who wrote
12 the wastewater regulations in the multiple
13 states. We've got another expert who wrote 17
14 patents when it comes to wastewater treatment
15 plants and different techniques in the poultry
16 context. And we've got folks on air emissions
17 and the health effects and hydro-geologists and
18 all the stuff.

19 We were offering to let the state use
20 that resource, at no cost to the State of
21 Delaware by the way. Hey, listen, these people
22 do this for a living. And they've got some
23 opinions as to the best way to potentially



1 resolve this.

2 So there was no notice. There was no
3 participation possibility for public comment.
4 There was no opportunity for any of these folks
5 to talk about the problems that they are
6 experiencing and maybe the best ways to resolve
7 them.

8 They've opposed intervention in federal
9 court. They are opposing it here today. Again,
10 it's a weird juxtaposition. Shouldn't Mountaire
11 sort of be on our side? Shouldn't we be doing
12 this together?

13 And then what we have is we've got some
14 case law out there which talks about the fact of
15 whether or not the prosecution has been
16 diligent. And the case law that we've cited in
17 our papers talks about the fact that when a
18 state, actor or an agency denies the opportunity
19 for public participation and opposes
20 intervention, then that in and of itself is
21 evidence of a lack of diligent prosecution.

22 There is actually even one case cited in
23 our papers, Your Honor, which says simply if you



1 file an enforcement action and the same day
2 you've already filed your settlement agreement,
3 that in and of itself is evidence of the failure
4 to diligently prosecute the case.

5 THE COURT: I don't know if that was the
6 Frilling case or not.

7 MR. BROCKSTEDT: That's right. This is
8 actually a case cited by the Frilling court,
9 Your Honor.

10 And so the facts here -- and I challenge
11 anyone to point to a single fact in this case
12 which demonstrates that DNREC is adequately
13 representing the folks that are the most
14 impacted by Mountaire's, you know, their conduct
15 here, Your Honor.

16 THE COURT: So DNREC says in one of
17 their arguments that there will be opportunity
18 for public input following the approval and when
19 the bids are out to do the work and that kind of
20 thing. But that's a horse of a different color.

21 MR. BROCKSTEDT: When you say following
22 approval, you mean following this court blessing
23 the settlement agreement.



1 THE COURT: Yes, if that were to happen

2 MR. BROCKSTEDT: So let's talk about
3 that concept for a second, Your Honor.

4 So what they are basically arguing there
5 is that, oh, no, no, there will be an
6 opportunity down the road for there to be this
7 conversation with the public about what we are
8 doing is the right thing.

9 In the meantime, what we know that they
10 are asking this court to do is to bless this
11 settlement agreement and make it a court order
12 so that it disposes of this case. So the
13 ability for us to walk in here, unless there is
14 a violation of something, has gone. It disposes
15 of the federal court case and the federal claims
16 there. It releases Mountaire.

17 And I want you to think about the
18 release in these terms, Your Honor. In 2003,
19 the EPA came in and cited Mountaire for
20 violating the Safe Drinking Water Act. They've
21 got to make it so that people can drink safe
22 water. In 2003 there was a consent order put in
23 place on that particular issue. It's still in



1 effect. We are almost at 2019.

2 So, Your Honor, when we've got a release
3 that is in state court with actors saying, with
4 DNREC and Mountaire saying, oh, no, no, nothing
5 to see here, we are only resolving state court
6 claims, but you are resolving federal claims.
7 You are eliminating federal intervention and a
8 federal action. And you are saying, Mountaire,
9 don't worry about anything that you've done in
10 the past and don't worry about anything you do
11 in the future.

12 Because if you take a look at the
13 language now in 62, Your Honor, Paragraph 62,
14 all they really have to do is try to meet the
15 standards under their permits, try to meet the
16 obligations of the regulations and try to comply
17 with the law. And then whether it's 5 years
18 from now or whether it's another 15 years from
19 now, Mountaire, you let us know when you think
20 you've reached substantial compliance and then
21 we will let you out of this consent decree.

22 Your Honor, I have been thinking about
23 this all night. Why in the world would DNREC



1 give that kind of release? How can that
2 possibly protect the people that can't go to
3 their kitchen faucet and drink a glass of water
4 or open their windows when it's a nice day
5 outside? How can that possibly protect them?

6 THE COURT: One thing that's been
7 pointed out is that, on both sides, is that if
8 the decree were entered and approved, it should
9 be made available to the federal court. And the
10 position taken there, that everything is moot.
11 So the federal court action, for all intents and
12 purposes, ends.

13 MR. BROCKSTEDT: Of course.

14 THE COURT: So that's part of what you
15 are saying. Sure.

16 MR. BROCKSTEDT: Of course. We would be
17 in a different situation if they were coming
18 here and saying, oh, no, no, this is some state
19 law stuff. We're dealing with state law issues.
20 The federal court case is going to be the
21 federal court and that's that.

22 And, Your Honor, what we really don't
23 want to have happen here is, number one, we



1 don't want to lose our rights. We don't want
2 lose the ability to advocate on behalf of -- you
3 know, we represent a little bit more than 750.
4 There is probably 1,000, maybe 1,100 people that
5 are affected by this. And we don't want to have
6 this settlement agreement, which our experts say
7 doesn't even begin to scratch the surface,
8 entered in by this court.

9 Your Honor, just quickly, and just so
10 you know, Your Honor, if there is intervention
11 in the federal court or if there is intervention
12 in this court, at some point in time someone is
13 going to have to look under the hood of this
14 consent decree, this settlement agreement, and
15 find out exactly what it is that Mountaire is
16 agreeing to do in terms of upgrading, you know,
17 changing their practices, whatever that may be,
18 Your Honor.

19 THE COURT: Just for purposes of
20 clarification, you had, on behalf of your
21 clients, provided notice that you want to file
22 suit, citizen type suit in federal court. And
23 then in time frame, as you term it, we had two



1 friendly suits filed by DNREC.

2 If they had not done that in the federal
3 court, then you would have been able to assert
4 private causes of action for violation under the
5 federal and environmental laws?

6 MR. BROCKSTEDT: We would have filed
7 under federal court, that's correct, Your Honor.

8 THE COURT: Those would have been
9 private causes of action that, even I think in
10 the state's brief here, indicate the legislation
11 would support it. But by doing this then, you
12 essentially, from your point of view, you have
13 been blocked from this. And this is being used
14 as subterfuge here. You have a consent decree.
15 A federal judge is saying it's moot. It's kind
16 of an end run around what the rights otherwise
17 would be litigating cause of action in federal
18 court; is that kind of what's going on?

19 MR. BROCKSTEDT: That's exactly right.
20 You've got it, Your Honor. So what I was going
21 to say -- and I don't know if we even need to go
22 down this road.

23 THE COURT: I think it's okay to go down



1 a road. I think it's very helpful to talk. A
2 we're going to hear from all sides. I just want
3 to get what your understanding is of the law
4 with respect to the court's -- let's say, for
5 purposes of talking, I saw in the opposition
6 that was filed by DNREC in the intervention in
7 federal court that it went through, toward the
8 end, they said but if intervention is permitted,
9 they ask that there be some parameters
10 established to it.

11 And I also saw that there was some
12 reference in the case law that where there has
13 been intervention, that there was no right to
14 block a settlement. I mean, I saw those kinds
15 of words in some of the decided cases.

16 So where you have an intervention,
17 should that be the case, what is the standard
18 that a judge employs? And is there any
19 guidance, in Delaware particularly, as to that?

20 MR. BROCKSTEDT: That's not an issue we
21 specifically brief, Your Honor. But my
22 understanding of the law is that the settlement
23 can't be arbitrary and capricious. And that's



1 exactly what we have here. And that's sort of
2 where I was going to go, Your Honor.

3 Now, our experts talked about the fact
4 that the settlement agreement that's being
5 proposed, aside from the relief and aside from
6 its effect on federal law and all this kind of
7 stuff, but, again, there will be a hearing at
8 some point in time or some inquiry as to the
9 merits of actually what's happening here.

10 And as we put in our papers, I mean,
11 this settlement agreement, it just doesn't
12 address many of the issues.

13 THE COURT: Well, we have at least
14 three, maybe more, weren't addressed. You
15 talked about the sludge at one point, the
16 storage for the effluent not being adequate as
17 another point. And there are different points
18 from what is being advocated on your side of it
19 that are not even covered in the agreement at
20 all.

21 So if that's the case -- and I don't
22 know if that's the case. We'll hear from both
23 sides. But I'm just thinking to myself -- I'm



1 trying to get a global idea of what's going to
2 happen by decisions. What does a judge do in a
3 settlement? Is it arbitrary and capricious? If
4 things aren't addressed, is that the end of it?
5 Is it kind of like, very roughly speaking, a
6 business judgement kind of thing? People can
7 disagree about these things? That's the kind of
8 things going through my mind. What is the
9 measuring stick?

10 MR. BROCKSTEDT: Your Honor, I would
11 like to have the opportunity to brief that and
12 provide the Court some specific guidance on
13 that. I don't know if those are necessarily at
14 issue right here this morning.

15 But our understanding of the standard is
16 arbitrary and capricious. And what I was going
17 to show Your Honor is this diagram that shows
18 well readings from plaintiff interveners'
19 clients, our clients, Your Honor, more than 750
20 people. And this is sort of the whole zone of
21 the area. These green areas are the sludge
22 fields. These are the spray fields down here.
23 This is the Mountaire plant, Your Honor.



1 And, again, I'm just using this to
2 demonstrate. In the consent decree, the area
3 that they are talking about potentially
4 providing some alternate water supply, which --

5 THE COURT: 15 percent.

6 MR. BROCKSTEDT: -- let's talk about
7 that for a second.

8 An alternate water supply is not putting
9 bottles of water on the front porch of these
10 people's houses. So that needs to be said out
11 loud. This area right here, that's the area in
12 the proposed consent decree. These are all of
13 the people that we know are affected. They are
14 downgrading of the sludge fields, downgrading of
15 the spray irrigation fields.

16 We've got expert opinions that aren't
17 saying that, hey, your nitrates are just high
18 because they're high. They are high because of
19 Mountaire's practices.

20 THE COURT: Is that roughly 15 percent
21 or something?

22 MR. BROCKSTEDT: Something like that,
23 Your Honor. It doesn't, the consent decree



1 doesn't even address the air emissions. That'
2 the plant right in the middle. The yellow
3 exceeds the state standards. The green is
4 double the state standards. The red is 10 times
5 the state standards, 10 times. Not addressed at
6 all.

7 So, again, I think the next step, Your
8 Honor, if there is going to be an
9 intervention -- and, again, whether we are
10 litigating these issues in federal court or if
11 we are intervening here, the issue is going to
12 be that we are going to have to understand what
13 it is that's being resolved here.

14 Your Honor, they've come into this
15 courtroom and they are asking you to sign this
16 settlement agreement. And the design documents
17 of what they are actually supposed to do that
18 they have been fighting tooth and nail in our
19 companion case in the class action not to
20 produce, why aren't they here? Why isn't there
21 some expert testimony walking this court
22 through, hey, look, this is what they are
23 planning to do and here in our expert opinion on



1 behalf of DNREC or Mountaire -- I mean, they a
2 both in the same camp here -- this is how it's
3 going to resolve the problem?

4 I mean, how can anybody sign this
5 settlement agreement when we don't even know
6 what's being done? And what we know is, we know
7 what's not being done, what's not being
8 addressed.

9 THE COURT: So maybe, in a way, there is
10 a suggestion that if there was a hearing -- and
11 I guess there will be a hearing at some point --
12 that it would be more than just looking at the
13 paperwork.

14 MR. BROCKSTEDT: Absolutely, Your Honor.
15 I don't know how we can get by with just looking
16 at the paperwork. We are not here complaining
17 about the paperwork. We've got a dozen experts
18 who we've had come through this thing and sort
19 of understand the scope and the severity of the
20 contamination and provide expert opinions.
21 These aren't lawyers talking. These are
22 experts. These are people that are in the
23 industry. These are credible folks that are on



1 both sides of the litigation. They are not fo
2 plaintiffs. They are not for defendants. They
3 are for environmentally responsible remedies and
4 environmentally responsible practices and
5 procedures. That's what these folks dedicated
6 their life to.

7 THE COURT: Well, an agency like DNREC
8 being a public agency, isn't there at least a
9 presumption that they have their own expertise
10 to bring bear on these things, and that that's
11 what they have done, and they claim they have
12 been negotiating this thing for a substantial
13 period of time and this is representative of
14 their best efforts of what can be obtained?

15 MR. BROCKSTEDT: I mean, I guess they
16 say that. Okay. Where is the evidence of that?
17 Where is the proof? I mean, you know, how is it
18 that they are going to convince this court to
19 sign the settlement agreement because what they
20 are doing is the right thing? Because they say
21 so?

22 And, listen, nothing against DNREC. And
23 I recognize that they are a state agency. And I



1 recognize that there are funding issues and
2 staffing issues and all of the things that are
3 related to state and government, you know,
4 industry and institutions, and I get all that
5 stuff.

6 But, I mean, they don't have a great
7 history when it comes to enforcing regulations
8 against this plant. I mean, it's 2003, 2009,
9 2010, 2017 and we've got more than a hundred
10 violations. Now, at some point in time we've
11 got to figure out what is going to resolve this
12 and we've got to do it.

13 THE COURT: Well, the inland bays had a
14 study that is part of the paper submission. And
15 it referenced EPA, there was some criticism by
16 the EPA.

17 MR. BROCKSTEDT: Sure. That's exactly
18 right. And, also, Your Honor, the inland bays
19 report was, you know, I think an objective
20 reading of that is it was pretty much a
21 condemnation of Mountaire's practices.

22 They talked about the fact that Swan
23 Creek and the Indian River and Indian River Bay



1 are being polluted by Mountaire. Nothing in t
2 consent decree that -- they reference
3 hydro-geologic connections from Mountaire to
4 those areas, but there is nothing that's going
5 to stop that at all. So those concerns aren't
6 even addressed, same with air and the same with
7 this 15 percent business.

8 So, Your Honor, again, just to sort of
9 get back to where we are in this thing, as I was
10 driving over here this morning I'm thinking to
11 myself. Mountaire and DNREC are coming into
12 this courtroom and they are saying this is state
13 issues. We are not resolving federal claims.
14 Their compliant, DNREC'S complaint and the
15 settlement agreement clearly do. Okay.

16 We are coming into this courtroom and
17 they are saying bless this settlement agreement,
18 put your rubber stamp on it despite the fact
19 that we don't have the documents and there is no
20 evidence to suggest that it's going to solve any
21 of the problems, affirmative evidence that it's
22 going to solve the problems.

23 And then on top of that on this record



1 you've got, from plaintiff interveners, you've
2 got a mountain -- and I know they are in your
3 office, I'm sure, sir -- you've got a mountain
4 of documents and affidavits and expert reports
5 saying this is not even a Band-Aid.

6 So, again, I go back to, how does this
7 protect our clients? How does this protect and
8 resolve the issues for the people that DNREC is
9 supposed to protect? Your Honor, we can go
10 through it. We stand in Rule 24. We have the
11 rights. I think that's flushed out in the --

12 THE COURT: I think they're pretty
13 adequately covered in the briefings. Thank you,
14 sir.

15 MR. BROCKSTEDT: Thank you, Your Honor.
16 I appreciate it.

17 THE COURT: Good morning.

18 MR. NIDEL: Good morning, Your Honor.
19 Chris Nidel on behalf of the Balback plaintiff
20 intervenors. I'm not going to repeat.
21 Mr. Brockstedt did, I think, a great job
22 covering many of the issues. I just want to put
23 a finer point on a few of them.



1 I think the big thing here, we filed o
2 Notice of Intent. We filed the first Notice of
3 Intent. We filed that on behalf of 45
4 individuals, plus a nonprofit organization.
5 This is not a repeat of the tort case. This is
6 an action to take care of the federal and state
7 violations of environmental laws.

8 So we filed that on the very day that we
9 could then file our federal claim as a result of
10 that notice. DNREC filed in federal court and
11 then filed in state court. And as Your Honor
12 pointed out, it appears that that was done
13 specifically to close the door to federal court.

14 As Your Honor, I think, pointed out
15 earlier in your discussions with Mr. Brockstedt,
16 what we were going to do is we were going to
17 file our federal court claims, statutory and
18 environmental claims, along with our tort claims
19 in one court and have those all resolved in
20 federal court.

21 However, the action that DNREC took by
22 filing the case in federal court and then
23 putting a stay to that and then filing this case



1 closed the door to federal court for us. And
2 we filed our case in state court. We no longer
3 had federal statutory claims to hang our tort
4 claims on. And so we pursued those claims in
5 Your Honor's court in parallel with this.

6 The question that I think we have that
7 we share with the other plaintiff interveners
8 is: What is being released? There is
9 discussion from DNREC that says we are not
10 talking about federal claims. In your previous
11 discussion, I think you understand that both the
12 complaint that they filed and the release or the
13 consent decree they're proposing mentions and
14 references in that Paragraph 61 that these
15 include open dumping and RCRA claims as well
16 Clean Water Act claims.

17 So one of our big concerns, outside of
18 the question about which Mr. Brockstedt did a
19 very good job of addressing as far as the
20 adequacy of the substance of what they are
21 doing, is what's being released. So are those
22 federal claims really at issue in this consent
23 decree? They were brought in federal court. As



1 the parties have indicated, they plan to go ba
2 to that federal court if Your Honor is to stamp
3 this agreement and say everything has been
4 resolved. So it really appears that there are
5 federal claims at play here even if they are
6 beneath the surface.

7 So that is a concern for us. Because if
8 there are federal claims at issue here, then as
9 Your Honor pointed out, we have a right to
10 intervene. And, in fact, DNREC should not be,
11 per their agreement with the EPA, opposing our
12 intervention, which they are doing here. So you
13 have an interesting scenario where I think the
14 biggest issue for us is the ambiguity of what's
15 being resolved here.

16 The other issue that we have that really
17 forces us to come here into your court in this
18 case is that there are protections in the
19 proposed consent decree for both Mountaire and
20 for DNREC so that this doesn't create
21 third-party claims against either of them.

22 But what it does not do is it does not
23 carve out the rights of the citizens that we



1 represent, along with Mr. Brockstedt, to bring
2 their claims. So it's very unclear what the
3 intention of this consent decree is and the
4 breadth of its release as far as any other
5 claims.

6 I know Mr. Brockstedt said, his words
7 were completely releases Mountaire. And I just
8 would want to put some boundaries on that. It
9 attempts to completely release them for these
10 administrative claims. It does not release them
11 from liability for the tort claims and for the
12 other claims that we have brought. But we would
13 certainly be more comfortable with language in
14 an agreement that carves out those claims and
15 says this is an administrative action related to
16 an upset. It doesn't go back in time, and it
17 certainly doesn't have an effect on state court
18 claims that were brought by private citizens and
19 other individuals.

20 So, you know, I think there is clearly
21 an inadequacy of representation. Rule 24
22 provides three ways that we are allowed to
23 intervene. Number one, as Your Honor pointed



1 out, when there is a statute that gives you a
2 right to intervene, we should be automatically
3 allowed to intervene.

4 And if the federal court claims or the
5 federal statutory claims are at issue -- which
6 while they say they are not and it appears that
7 they are -- we should be guaranteed a right to
8 intervene. Even under 24(a), we are also
9 guaranteed a right to intervene if our interests
10 are at stake and if the outcome could impair us
11 and if we are inadequately represented.

12 And I don't need to repeat the adequacy
13 of representation issues. But if you look at
14 how this lawsuit started with our notice to
15 intervene on behalf of a bunch of citizens and
16 this nonprofit, the state was sitting on these
17 violations for years. There is a record of
18 violations going back to 2003 that Mountaire has
19 not been brought into compliance and that the
20 state was sitting on.

21 So the state would be hard-pressed to
22 say that they adequately represented the
23 interests when they waited until the last day



1 that they could file a lawsuit after we notice
2 them of that intent.

3 And, finally, certainly under the
4 permissive intervention standards of 24(b), we
5 should be allowed to intervene.

6 So Your Honor asked the question about
7 what that looks like if we do intervene. I
8 think that's a good question. I think that this
9 court doesn't need to address that today. But
10 the standard in federal court, under the federal
11 statutes I should say, whether it's in this
12 court or in federal court, if we are pursuing
13 the federal claims is whether there is diligent
14 prosecution. Right?

15 And so I would assume that there would
16 be a consent decree or a proposed consent decree
17 that would come before Your Honor. And then the
18 question would be whether that represents
19 diligent prosecution or whether that represents,
20 as Mr. Brockstedt said, proposed as a sweetheart
21 deal that is seeking a rubber stamp.

22 And so there would be a discussion about
23 whether, in fact, that represents diligent



1 prosecution, which could, as the case
2 complexities unfold, provide an opening of the
3 door in federal court to reopen that citizen
4 suit in federal court because there lacks
5 diligent prosecution in this court. And there
6 are a layer of complexities that would unfold at
7 that point.

8 But I think, at this point, the rule
9 makes it clear that, for today's discussion,
10 under all three of the ways that Rule 24
11 provides that both sets of plaintiff interveners
12 should be allowed to intervene in this case.

13 THE COURT: For the lack of what you
14 phrase diligent prosecution, then the argument
15 would be the absence of some things from the
16 agreement which, from your point of view, your
17 clients' point of view, should have been
18 provided for as referenced by Mr. Brockstedt,
19 the problem with the sludge and the other
20 things?

21 MR. NIDEL: That's correct. And the
22 problem would be that, you know, one of the
23 problems that Mountaire and DNREC would face is



1 that if, in fact, this agreement as it stands
2 now were to be approved, both sets of plaintiff
3 interveners could go back to federal court and
4 say sure enough they have an agreement, but
5 there is no diligent prosecution and file the
6 suit that we noticed 60 days before DNREC filed
7 and pursue that in federal court, which would
8 just further complicate what the citizens and
9 the environment really need, which is
10 appropriate attention and cleanup of this issue.

11 Thank you, Your Honor.

12 THE COURT: We'll just take a short
13 recess.

14 (Whereupon, a brief recess was taken.)

15 THE COURT: I want to hear from counsel
16 just on the last point. I would like some
17 clarification, please. Yes. Thank you.

18 Just for clarification purposes, I think
19 toward the end of your presentation, did I
20 understand the position -- or I might have
21 misunderstood it. That's why I want some
22 clarification, please.

23 MR. NIDEL: Sure, Your Honor.



1 THE COURT: I've got that regardless o
2 what happened here, you would be able to still
3 go back to the federal court and state the
4 position that there was a lack of diligent
5 prosecution by the agency and still be able to
6 assert the federal claims regardless of what
7 happens here today? Did I misunderstand that or
8 no?

9 MR. NIDEL: What this would create is a
10 hurdle to doing that. Now what bars claims --
11 so we noticed the claims. We were then, after
12 the total of 60 days, able to file a federal
13 case in federal court. What would bar the
14 federal case is if the state was already
15 diligently prosecuting it.

16 So the state would argue that this
17 agreement shows diligent prosecution. They sued
18 them. They sued them both in federal court.
19 They sued them in state court. They negotiated
20 for months, as we've already heard, and they
21 reached an agreement that was the result of
22 diligent prosecution.

23 We would have to overcome that burden.



1 But that would be an argument that we could ma
2 that this agreement does not reflect the outcome
3 of diligent prosecution. So it would be an
4 impediment. It would not -- the argument would
5 be similar to what you've heard here, that this
6 agreement is not sufficient. We would have the
7 additional hurdle of the court's blessing of
8 that agreement as if it were a diligent
9 prosecution. So it would increase the burden
10 for us significantly. But that would be the
11 argument that would have to be made in federal
12 court.

13 THE COURT: And what effect -- would it
14 be a collateral estoppel kind of thing, I mean,
15 if the issue is actually before a judge in the
16 Superior Court? Would that not end it?

17 MR. NIDEL: Right. So what Mountaire
18 and DNREC have said, particularly DNREC has said
19 is that this agreement is focused on specific
20 aspects historically rather than the whole
21 history of violations. So there would be some
22 argument, I'm sure, from DNREC that there were
23 issues that were estopped based on what was



1 agreed to here. There would be issues,
2 arguments from the interveners that not all
3 issues were dealt with or addressed by that
4 agreement that the court blessed.

5 THE COURT: So this assumes that
6 intervention was not granted?

7 MR. NIDEL: Correct, Your Honor. What
8 intervention would allow us to do is to flesh
9 out the substance of that so that if, in fact,
10 we are put in that position, we would have
11 greater access to voicing the substance of that
12 so that we could, if we were forced to be in
13 that position to make that argument in federal
14 court, that we could, that we would have sort of
15 the history of what happened here to then make
16 that argument in federal court.

17 So I think the first argument, Your
18 Honor, is, as we have stated from the beginning,
19 is that we should be allowed to intervene, that
20 the rule allows us to intervene. And that after
21 participation in this case, if an agreement, as
22 you pointed out, we may not have the ability to
23 completely shut down an agreement even if we



1 participate.

2 So if that agreement does not reflect
3 diligent prosecution, we then have some option,
4 all be it with a hurdle, to argue in federal
5 court that we maintain a right to pursue those
6 claims because they weren't diligently
7 prosecuted in the state court.

8 THE COURT: If an agreement can't be
9 blocked, does the court nonetheless have the
10 authority to disapprove it or no? Again, what
11 are the parameters?

12 MR. NIDEL: The court has the authority
13 to approve or disapprove. The additional
14 benefit of the plaintiff interveners is that we
15 then have, as Mr. Brockstedt has already
16 presented to the Court, the ability to raise our
17 voices to the court to show how this is not
18 adequately protecting the environment and the
19 citizens that are impacted.

20 So allowing intervention would at least
21 give us that voice to the court's ear so that
22 the court would be moved to approve an agreement
23 that does, in fact, protect both the environment



1 and the laws and the citizens.

2 THE COURT: I appreciate the
3 clarification.

4 MR. NIDEL: Thank you, Your Honor.

5 THE COURT: And, Mr. Brockstedt,
6 anything you would like to say as to that point?

7 MR. BROCKSTEDT: None, Your Honor.

8 THE COURT: Thank you. We will hear
9 from the state.

10 MS. SCOTT: Good morning, Your Honor.

11 THE COURT: How are you? Good to see
12 you.

13 MS. SCOTT: Good to see you. Devera
14 Scott, Deputy Attorney General, the Department
15 of Justice. I represent DNREC. With me here
16 today is my co-counsel, William Kassab, and the
17 Deputy Cabinet Secretary, Lisa Borin Ogden.

18 THE COURT: Good to see you. You can
19 even come forward if you'd like.

20 MS. BORIN OGDEN: Thank you, Your Honor.

21 THE COURT: Just like church. Nobody
22 wants to be --

23 MS. SCOTT: May it please the Court, I



1 would just like to dispel some misunderstandin
2 about DNREC's intent for entering into this
3 consent decree. There has been some allegations
4 that there was subterfuge and intention to
5 prevent the third parties from pursuing their
6 claims.

7 DNREC's purpose for entering the consent
8 decree was not to impede third parties' ability
9 to litigate their damage claims. The purpose
10 was straight forward. And it was to meet the
11 intent of Chapter 60.

12 The scope of this action and the consent
13 decree is state law and the state permit
14 violations that led to and were caused by the
15 upset at Mountaire's wastewater treatment
16 facility's catastrophic failure in September of
17 2017. Third parties' lawsuit, on the other
18 hand, goes back many, many years, if not
19 decades, to address issues related to
20 groundwater contamination.

21 I don't want to argue the merits of the
22 consent decree, but I would like to explain the
23 purpose or reasoning behind using a consent



1 decree as an enforcement tool.

2 The General Assembly invested the
3 Secretary of DNREC with many tools, enforcement
4 tools in order to complete its mission to
5 protect the environment. The secretary can seek
6 voluntary compliance, conciliation order,
7 administrative penalty, a civil penalty, which
8 would be pursued in this court, cease and desist
9 order, equitable relief in the Court of
10 Chancery, or even seek criminal penalties.

11 In this case, the DNREC secretary opted
12 to use a consent decree as his tool to resolve
13 the permit violations, the violations of state
14 law, state regulations that led to that 2017
15 catastrophic upset.

16 THE COURT: What standard would a judge
17 employ with respect to the consent decree?
18 What's your understanding? What standard would
19 a judge apply?

20 MS. SCOTT: An action of the secretary
21 under Chapter 60 is whether the evidence before
22 the secretary supported that decision.

23 THE COURT: So when it comes to a judge



1 to take a look at it, is it anything more than
2 paper exercise? Or what's the measuring stick?
3 Is there more to it than that?

4 I mean, one side suggested that it was
5 arbitrary and capricious. The same side, from
6 elaborating on that, said whether there was
7 diligent prosecution.

8 MS. SCOTT: Well, there is a little
9 misunderstanding, too, about what the consent
10 decree provides. It doesn't wrap up the
11 violations in a package and resolve them. It's
12 a starting point.

13 What this consent decree provides for
14 DNREC is an opportunity to move forward, to
15 require Mountaire to upgrade its facility.

16 Since September, 2017, DNREC has spent
17 months investigating, talking to Mountaire about
18 the situation, trying to determine what the best
19 path forward was with DNREC'S experts talking to
20 Mountaire's experts. They talk on a regular
21 basis. And I have attended those meetings.

22 And then once those discussions realized
23 what the resolution should be, which is the



1 upgrade to the facility, then we began
2 negotiating this consent decree. And the
3 consent decree provides the upgrade to the
4 facility so that Mountaire can meet its permit
5 requirements.

6 And that construction of that facility
7 is just the start. What it requires Mountaire
8 to do is submit a permit application for the
9 construction of that facility. Under Chapter
10 60, the General Assembly has created a right for
11 the public to participate in that process, to
12 review the documents, to comment, to attend
13 public hearings and, if they have standing, even
14 to appeal to the Environmental Appeals Board.

15 The next step, once the facility is
16 constructed, would be that Mountaire would need
17 to apply for an operations permit. Again, that
18 would create another opportunity for the public
19 to participate through the normal process,
20 reviewing the documents, reviewing the
21 application, participating in hearings, and
22 commenting and providing input to the
23 department.



1 When the secretary entered into this
2 consent decree, he did so acknowledging that
3 litigation could have taken many routes. He
4 could have taken the civil. He could have filed
5 a lawsuit in this court seeking civil penalties
6 without a consent decree.

7 But acknowledging that litigation takes
8 many years, that the outcome of litigation is
9 uncertain, that the source of the contamination
10 in the private wells, if any, that was present
11 before the catastrophic upset will be hotly
12 contested through extensive fact and expert
13 discovery, the secretary wanted to stop the
14 permit violations. He wanted to remediate the
15 resource, to provide the neighbors with
16 alternative drinking water supply, provide the
17 environmental beneficial offset steps, impose a
18 monetary penalty on Mountaire and, most
19 importantly, to provide the public an
20 opportunity to participate through that permit
21 process.

22 The third party not only confused
23 DNREC's purpose for entering the consent decree,



1 but they also confused the underlying statutor
2 basis for this lawsuit and the authority for the
3 secretary to enter into the consent decree,
4 which is Chapter 60.

5 There is a parallel and separate federal
6 court complaint that the parties have already
7 discussed that allege violations of the Clean
8 Water Act and of RCRA. And the Cuppels movants,
9 Mr. Brockstedt's clients, have moved to
10 intervene in that action. And the court, the
11 federal court is the appropriate forum to
12 determine if those claims have merit and whether
13 they should be able to intervene in the federal
14 case.

15 THE COURT: So we might as well talk
16 about that now since the subject has come up.
17 But, first of all, what is the measuring stick
18 here? Do we know?

19 MS. SCOTT: Well, under Chapter 60.

20 THE COURT: You listed maybe five
21 sources in the complaint, in the moving papers
22 for the approval.

23 MS. SCOTT: Right. What's the authority



1 to enter the consent decree?

2 THE COURT: No, I know there is
3 authority. I'm asking what the measuring stick
4 of a judge is in this situation.

5 MS. SCOTT: Whether it's arbitrary or
6 capricious or some other measure?

7 THE COURT: That's right.

8 MS. SCOTT: Well, under Chapter 60,
9 6008, it is whether or not the evidence before
10 the secretary supports the decision to enter.

11 The secretary also has the authority
12 under Chapter 80 as well to enter into
13 contracts. But we would argue whether or not
14 the secretary's decision is supported by the
15 evidence before him.

16 THE COURT: All right. I understand
17 that's your argument.

18 Now, the other aspect before we -- well,
19 we've talked about intervention. Certainly
20 under the Clean Water Act and the other act
21 that's in issue seems to provide for an absolute
22 right for intervention.

23 MS. SCOTT: I don't know that the



1 movants have an absolute right in federal cour
2 The statute talks about the right to intervene
3 to enforce the law, not to pursue private
4 claims. But --

5 THE COURT: Doesn't it give a right of
6 intervention?

7 MS. SCOTT: They can petition to
8 intervene.

9 THE COURT: There is a difference
10 between can petition and actually come in, be
11 allowed to come in. When it says you have a
12 right to come in, how can a judge say you can't
13 come in?

14 MS. SCOTT: The judge can determine
15 whether or not to allow the parties to intervene
16 and the scope of that intervention.

17 THE COURT: It's certainly the scope. I
18 saw that in play in the papers that were filed
19 in the federal case by DNREC.

20 MS. SCOTT: There is a private right of
21 action in the federal laws that does not exist
22 here.

23 THE COURT: Right.



1 MS. SCOTT: So they can certainly purs
2 their intervention in federal court to address
3 those Clean Water Acts and RCRA claims.

4 THE COURT: So why is the department
5 opposing in the federal case? It's hard, on the
6 face of it, to understand that. And there may
7 be good reasons. I'm just looking at it
8 superficially, of course.

9 MS. SCOTT: The department's purpose in
10 entering the consent decree, was, again, to
11 address the violations of the September, 2017,
12 catastrophic system failure that were caused by
13 these permit violations.

14 So to the extent that we've got state
15 law claims, state permit violations, and clean
16 water and RCRA possible claims as well, it just
17 gives us, too, a path forward for us to address
18 those claims, to keep Mountaire's feet to the
19 fire, so to speak, so that the remediation, so
20 that the measures that we've laid out in the
21 consent decree can be enforced. Covering all
22 the bases so to speak.

23 THE COURT: Well, how does not allowing



1 the intervention in the federal court -- the
2 statute seems to say they have that right. How
3 does that help that forward?

4 MS. SCOTT: We feel this consent decree
5 addresses the scope that we are trying to
6 resolve, which are those violations that led to
7 the 2017 upset. We are not looking to expand --
8 this consent decree does not expand the scope to
9 go back decades when Townsend Brothers owned the
10 property. We want to provide a remedy as soon
11 as possible to the residents and to preserve the
12 resource.

13 THE COURT: In the papers that were
14 filed -- and it might have been on the replies
15 and it might have been from Mr. Brockstedt's
16 side of it -- there was an extract taken
17 explaining the role of DNREC and exercising
18 enforcement of matters which have been delegated
19 to DNREC by the Clear Water Act and RCRA. There
20 is language in there, but it also talks about
21 the citizens have a right to intervene.

22 So if citizens have a right to intervene
23 and Rule 24(a) says that's one of the ways you



1 come in, if the statute grants a right to
2 intervene, what is the basis for the opposition
3 on that?

4 MS. SCOTT: Again, Your Honor, it's just
5 so that the consent decree -- so that DNREC has
6 the ability to enforce the consent decree so
7 they can get these measures started, the
8 provisions for not only the system upgrade but
9 for the alternative water supply, which are not
10 just bottles of water on the steps of the
11 neighbors, but to start a process in the PSC for
12 the CN process whereby the residents will have
13 the opportunity, if they wish, to be hooked up
14 to public water, which Mountaire is required to
15 pay for those connections.

16 So, of course, if the federal judge
17 allows those parties to intervene, then we will
18 proceed with that matter and participate in it.
19 But for this matter, which is the state law,
20 state regulation, state permit violations --

21 THE COURT: Well, what's been presented
22 in the papers, in the replies, is that, even on
23 the state's side of it, there's at least a



1 representation made that says that citizens ma
2 intervene. Are you familiar with the reference
3 in the papers?

4 MS. SCOTT: Yes.

5 THE COURT: So it doesn't seem to be
6 ambiguous.

7 MS. SCOTT: You are talking about under
8 Rule 24?

9 THE COURT: Yes, 24(a).

10 MS. SCOTT: Right. Well, unlike the
11 federal laws, there is no private right of
12 action.

13 THE COURT: I understand that. But I
14 mean, the argument is that they want to -- we've
15 heard all the arguments. There is so many
16 arguments. But what you're saying, the fact
17 that it would be frustrating to DNREC and
18 against the public interest to allow an
19 intervention because it gets in the way of the
20 enforcement of the environmental laws.

21 And you have a situation where you made
22 what you want to say is a discrete settlement of
23 the upset and turn everything upside-down if



1 people come in, in so many words.

2 MS. SCOTT: There is a public policy
3 argument, Your Honor. The General Assembly
4 vested the secretary with these tools to enforce
5 Chapter 60. If third parties were permitted to
6 have a seat at the table during settlement
7 negotiations, DNREC could not function
8 efficiently. It would encroach on their
9 statutory authority. But it would also impose
10 on the administrative and judicial economy.

11 Because the reality is that if DNREC had
12 to allow citizens to sit at the table when they
13 are negotiating voluntary compliance or
14 conciliation, then DNREC will just opt to use
15 the other tools.

16 THE COURT: Sure.

17 MS. SCOTT: Which will be a secretary's
18 order, administrative penalty order, civil
19 penalties, which necessarily would involve the
20 Environmental Appeals Board, this court, Supreme
21 Court, Court of Chancery.

22 And I think there are also unintended
23 consequences that I would like to point out. By



1 creating a right of action for citizens where
2 there is none created by statute, it not only
3 affects DNREC in this case. It affects DNREC
4 going forward and other state agencies.

5 THE COURT: So you are saying because
6 there is no private right of action -- it's
7 purely federal -- there is absolutely no room
8 for intervention by these applicants and,
9 essentially, the state proceed.

10 MS. SCOTT: Only not under Chapter 60,
11 no, Your Honor.

12 THE COURT: Is there any other basis?

13 MS. SCOTT: Is there any other basis for
14 them to intervene here?

15 THE COURT: Yes.

16 MS. SCOTT: There is certainly not a
17 statute that confers that right. They argue
18 whether or not there is a right to intervene --
19 they have no right to intervene under Rule
20 24(a). The two prongs being the private right
21 of action, which doesn't exist here, and whether
22 their interests are impeded or impaired by the
23 consent decree.



1 Again, the Clean Water, the RCRA claim
2 they are free to pursue in federal court. The
3 federal judge doesn't have the consent decree,
4 hasn't approved the consent decree. And
5 certainly that judge can determine whether or
6 not to accept it. It's a separate track.

7 They also have tort claims that are
8 separate and distinct from these permit
9 violations. So their interest in pursuing those
10 tort claims are not impeded by this state case.

11 Whether there is permissive
12 intervention, again, we disagree. There is no
13 private right of action. And there are no
14 common questions of law or fact. The law is
15 different. They are seeking common law tort
16 claims. And we are pursuing statutory permit
17 violations. The facts are different.

18 In order to establish their court
19 claims, they have to show damages to their
20 health, to their property. Whereas here, the
21 permit violations are just dependent on the
22 permits themselves and whether or not Mountaire
23 violated them. So the law is different. The



1 facts are different.

2 It would also create undue delay. We
3 are already -- five months have passed since the
4 complaint was filed. Fourteen months have
5 passed since the catastrophic upset. And every
6 day that passes, DNREC doesn't have the ability,
7 under the consent decree, to require Mountaire
8 to do what they promised to do, which is to
9 build an upgraded facility, to provide the
10 alternative water supply.

11 The upgrade to the facility will also
12 remediate the resource. So every day that
13 passes, DNREC doesn't have that ability to
14 require them to comply with what they promised
15 to do.

16 So our position is, again, Your Honor,
17 that there is no expressed or implied right
18 under Rule 24 for the state law claims here.

19 THE COURT: Just for the record, the
20 reference was in the intervener's reply brief,
21 Mr. Brockstedt's side. He has an exhibit that
22 was attached. And it was Department of Natural
23 Resources and Environmental Control, A Program



1 Description. And at Page 3 of that --

2 MS. SCOTT: Which exhibit was that, Your
3 Honor?

4 THE COURT: It's attached to his reply,
5 the program description. That says September
6 10, 2018.

7 MS. SCOTT: Solid and hazardous waste
8 management?

9 THE COURT: Well, on Page 3 it says F,
10 as in Francis, adequate enforcement. Do you see
11 that?

12 MS. SCOTT: Yes.

13 THE COURT: And it has this language:
14 Delaware also provides for public participation
15 in the enforcement process by allowing
16 intervention as a right in any civil or
17 administrative action as well as citizen suits
18 consistent with RCRA Section 7002.

19 So how is it then that these applicants
20 don't have a right in the sense of Rule 24(a)
21 for a basis to come in here?

22 MS. SCOTT: Well, this is under RCRA.
23 It's in the federal court.



1 THE COURT: It also says Delaware.

2 MS. SCOTT: Consistent with RCRA.

3 THE COURT: It says Delaware also
4 provides.

5 MS. SCOTT: Delaware also provides for
6 public participation in the enforcement process
7 by allowing intervention as a right in any civil
8 or administrative action consistent with RCRA.

9 Our position is that these aren't RCRA
10 claims. These are permit violations issued
11 under the division of water versus -- this
12 program description describes the solid and
13 hazardous waste management section. The permits
14 were issued by the division of water, not by
15 solid and hazardous waste. The regulations at
16 issue are division of water regulations, not
17 RCRA. It's not under RCRA.

18 THE COURT: All right. So you have a
19 land permit?

20 MS. SCOTT: We have land application
21 permits. Again, that's the surface water
22 discharge section of the division of water. We
23 have spray irrigation permits, which are the



1 groundwater section of the division of water.

2 Those are the permits that are at issue in the
3 complaint here in Superior Court.

4 THE COURT: Okay.

5 MS. SCOTT: Those permits are not under
6 a regulation or a law that relates to RCRA.

7 THE COURT: Okay.

8 MS. SCOTT: Well, I don't -- I think the
9 parties have already discussed -- we talked
10 about Rule 24. If Your Honor has any other
11 questions.

12 THE COURT: No. The briefing is pretty
13 thorough on all that. Well, it's a very nice,
14 well done briefing by all.

15 So the argument and the applicants are
16 saying that there was a requirement that notice
17 be given before even the suit was filed here and
18 an opportunity to be heard. Is that not
19 required or what's the position on that?

20 MS. SCOTT: Our position is that here in
21 Superior Court under Chapter 60, that notice
22 requirement is not provided.

23 THE COURT: I don't think they were



1 referring to how you proceed in the Superior
2 Court to provide prior notice. I think they
3 were referring to before a settlement agreement
4 is entered. Even before it gets to the Superior
5 Court that there was an obligation for notice
6 and a prior opportunity to be heard. There's a
7 reference. Is that --

8 MS. SCOTT: They do argue that under the
9 Clean Water and under RCRA. And certainly the
10 federal judge will consider whether or not that
11 obligation was met by DNREC or not. We feel
12 that the General Assembly has created -- there
13 is no private right of action under Chapter 60,
14 but they have created an opportunity for public
15 participation in the permit process.

16 THE COURT: But that comes at the end.

17 MS. SCOTT: It comes not at the end but
18 sort of --

19 THE COURT: Well, close to the end. I
20 mean, it would be after there had been approval
21 given and you go out to try to implement.

22 MS. SCOTT: Well, what would happen next
23 under the consent decree, within days of



1 entering the consent decree, Mountaire would
2 have to submit their construction permit
3 application. So it's pretty -- it comes very
4 close to the entry.

5 However, this court obviously retains
6 jurisdiction over the consent decree so that it
7 can monitor whether Mountaire is complying with
8 that consent decree. There will be a
9 construction permit application. There will be
10 an operations permit application. They have to
11 apply to the PSC for that CPCN process.

12 So, in our mind, it's a start of a much
13 bigger process. And construction of that
14 upgrade is supposed to take 18 to 24 months. So
15 it's really to start. And we are anxious for
16 Mountaire to start that so that it can have that
17 upgraded facility, provide the remediation, the
18 pump and treat system that we feel will
19 adequately address --

20 THE COURT: You say in part that this is
21 more or less a focused enforcement on what you
22 characterize as the upset.

23 MS. SCOTT: Yes. And I was thinking



1 when Mr. Brockstedt -- he said that since 2003
2 Mountaire has been under a consent decree with
3 EPA -- and that is true -- for violating the
4 Safe Drinking Water Act.

5 So 15 years ago EPA was involved. That
6 wasn't a DNREC action. That was an EPA consent
7 decree. So I'm wondering, if the wells were
8 allegedly contaminated since 2003, why they
9 haven't petitioned EPA or sought some
10 intervention in that consent decree under the
11 Safe Drinking Water Act.

12 Yes, this consent decree is focused on
13 the 2017, September, 2017, catastrophic upset
14 which was caused by the permit violations, the
15 state permit violations.

16 THE COURT: How did that upset come to
17 play? Was it a culmination over a period of
18 time, I mean, as opposed to just one unexpected
19 event?

20 MS. SCOTT: I guess sort of the straw
21 that broke the camel's back was that solids
22 built up in lagoons that caused the system to
23 fail.



1 THE COURT: One of the arguments --
2 there are so many arguments. One of the
3 arguments is that there has been no provision
4 for the lagoons and they are leaking and this,
5 that and the other thing, no provision for
6 storage. I mean, there are a lot of arguments
7 and, of course, their argument to follow and
8 there should have been, at least have some back
9 and forth with people. And they have these
10 experts. It might have been very helpful.

11 MS. SCOTT: I'm sure that they've hired
12 excellent experts. Again, our focus was on
13 remediating, stopping the permit violations,
14 providing interim measures so that we could get
15 to the upgrade of the facility.

16 And we have been monitoring that and
17 Mountaire has made strides. And the consent
18 decree also provides a means for DNREC to ensure
19 that those interim measures are met through
20 stipulated penalties.

21 But, at this point, our hands are tied.
22 We are in this situation, this sort of donut
23 hole where we have a consent decree. We have an



1 agreement. We have a path forward that we thi
2 is good for the resource, for the neighbors, but
3 we don't have the ability to enforce it or to
4 require Mountaire to start that process.

5 THE COURT: All right. So there is a
6 provision in Paragraph 51. Is one way to read
7 that release provision, isn't that more broader
8 than just looking at a discrete incident?

9 MS. SCOTT: That release, as I recall,
10 there was an understanding that Mountaire,
11 during the interim period, the time of upset
12 until the facility is completed, that they will
13 not be able to meet the 15.6 milligrams per
14 liter total nitrogen permit requirement.

15 So the purpose of that language was to
16 acknowledge that DNREC isn't going to sort of
17 pile on during the interim measures, during that
18 interim period, and so that Mountaire can move
19 forward, get the construction done but, at the
20 same time, work to bring those numbers down.

21 So that was the intent of that release
22 language where it talks to past or -- it really
23 speaks to sort of that gap period between the



1 upset and when the system is finally online.

2 THE COURT: There seems to be a wide
3 variation in the costs in so far as the
4 estimates between what it would take to get
5 things done. That just may be the nature of how
6 much is thought to be required or whatever.

7 MS. SCOTT: I've heard numbers. I've
8 heard 23 million. I don't know exactly how much
9 it will cost for Mountaire to do their upgrade.
10 It will be in the tens of millions of dollars.

11 THE COURT: There was a reference to a
12 stay I heard earlier. What is the position, if
13 you have a position, on that?

14 MS. SCOTT: Our position is that a stay
15 will only unduly delay the facility upgrade.

16 THE COURT: Because that would be like a
17 stalemate?

18 MS. SCOTT: Yes, yes. And there was
19 also some discussion of the scope of the
20 intervention in that maybe at some point later
21 the court can decide how the interveners can
22 participate. They wanted to defer that decision
23 to later.



1 But our position is deferring, allowin
2 the interveners the opportunity to possibly have
3 a limited scope, again, it just delays. It
4 delays the upgrade, the remediation, the
5 alternative water supply for those folks.

6 So we would be opposed to a stay or a
7 limited intervention. We request Your Honor
8 that you enter the consent decree so that DNREC
9 can move forward and enforce the consent decree.

10 THE COURT: Even enter it without some
11 kind of hearing?

12 MS. SCOTT: Yes, Your Honor. Going to
13 the merits of the consent decree --

14 THE COURT: What's the reason DNREC
15 requests approval? If we don't have a hearing
16 process, does it make any sense?

17 MS. SCOTT: DNREC is tasked with
18 enforcing Chapter 60. They do have the
19 expertise, as acknowledged by the General
20 Assembly, to formulate a consent decree or a
21 path forward. And DNREC would request that Your
22 Honor acknowledge or defer to DNREC's expertise
23 that this consent decree for the limited purpose



1 of resolving the 2017 catastrophic upset --

2 THE COURT: Part of what you seem to be
3 saying is that this is part of a toolbox of
4 things available to the secretary to have a
5 consent decree.

6 MS. SCOTT: Yes, Your Honor. Yes. And
7 the reason that we filed it in Superior Court as
8 a consent decree is to have that added layer so
9 that, Your Honor, you know, if Mountaire doesn't
10 comply, doesn't do what they promised to do,
11 that we can come back to Your Honor and seek a
12 remedy.

13 THE COURT: All right. What additional
14 remedies would you seek?

15 MS. SCOTT: That the consent decree be
16 enforced. If they are not timely applying for
17 permit applications or timely applying for the
18 alternative water supply or doing all the things
19 that are required by the consent decree, that
20 they are in violations of a court order.

21 THE COURT: A contempt?

22 MS. SCOTT: Yes, Your Honor. They would
23 be in contempt of a court order.



1 THE COURT: Is there anything else?

2 MS. SCOTT: No, Your Honor.

3 THE COURT: Thank you.

4 Good morning. How are you, sir?

5 MR. ARRINGTON: Good morning, Your
6 Honor. Michael Arrington with Parkowski, Guerke
7 & Swayze for the defendant, Mountaire.

8 Your Honor needs to look at what this
9 complaint is. It is 15 counts that seek civil
10 penalties and enforcement of state laws. What
11 we have just heard from my friends on the
12 plaintiffs' side or the interveners' side,
13 proposed interveners, is that they want not one
14 bite, not two bites but three bites at the apple
15 in this case to present their class action suit
16 in Mr. Brockstedt's case for all the harms that
17 Mountaire supposedly has done. Believe me, you
18 will hear those when that class action suit
19 comes.

20 THE COURT: It's over a hundred pages.
21 I looked at it. And your arguments now are
22 still being briefed. We are into class action
23 objections and all that. I looked at that and I



1 looked at the other complaints involved too.

2 MR. ARRINGTON: Our case for Mr. Nidel
3 and Mr. Crumplar is a little bit more discreet.
4 And I appreciate their argument. But both of
5 them said the same thing to you today, which is
6 we can bring these cases in federal court. Not
7 can they bring them in federal; they have to
8 bring them in federal court. Because the
9 federal statute and the third circuit says these
10 cases are within the exclusive jurisdiction of
11 the federal court. They are not in the DNREC
12 complaint.

13 Mr. Brockstedt has two complaints filed
14 in as exhibits to his motions to intervene. The
15 only difference between the two of them is he
16 leaves out in the state court that the federal
17 court has exclusive jurisdiction. So there is
18 no question this could be disposed of very
19 easily by the court saying --

20 THE COURT: Well, let's assume for
21 purposes of talking that you're right. Okay.
22 Why is it the rule then is so narrowly read
23 where it would preclude a situation where



1 people's interests, arguably, are being
2 implicated in the federal court by actions in
3 the state venue where, if the order was
4 approved, it would be filed in the federal court
5 and the argument would be presented to a federal
6 judge and all that's off and it's moot?

7 MR. ARRINGTON: No, it will be presented
8 to federal court because that's their motion to
9 intervene. The briefing is done in that case
10 and our arguments are in front of Judge Noreika
11 who will make her decision and, I assume, will
12 schedule oral argument in that case.

13 THE COURT: Well, what's in the papers
14 is that if the settlement agreement is approved
15 or the consent decree is entered here, that will
16 be presented to a federal judge, and the federal
17 judge will then be persuaded to say everything
18 is moot.

19 MR. ARRINGTON: We certainly hope the
20 judge will. We don't know what that judge will
21 do. And it's not his court's purview to guess
22 what the federal court might do.

23 THE COURT: Well, is it guessing or is



1 it just saying under the rule there is
2 consequences and that there is an interest and,
3 perhaps, that's something that can be heard?

4 In other words, why is Rule 24 so
5 narrowly construed as to preclude any
6 consideration of that? I'm not saying there
7 will be. But it seems to be the argument that's
8 being made.

9 MR. ARRINGTON: Well, the state court,
10 Rule 24, the argument Mr. Nidel made is the
11 correct one on that for us we think, which is
12 that there is no conditional or unconditional
13 rights. The first part of each of those rules
14 is out.

15 The second one, you have to look at what
16 the language says. And it says that they are
17 dealing with an interest in the specific action.
18 It's not any interest they might have. Everyone
19 in the State of Delaware has an interest in
20 clean water. Everyone in Delaware has an
21 interest in RCRA. Neither of those are in this
22 complaint. This complaint deals with
23 enforcement of state penalties against



1 Mountaire, which has conceded as part of this
2 whole process that there has been a violation
3 related to the upsets.

4 And if Your Honor focuses on what this
5 complaint is in, it will be clear to you that
6 you can't grant intervention because there is no
7 statutory right for them.

8 THE COURT: Never tell a judge a judge
9 can't do something.

10 MR. ARRINGTON: I can argue it, Your
11 Honor.

12 THE COURT: Never say never. I'm not
13 saying that's how it's going to work out, but
14 never say never. I have got in trouble many
15 times in my life when saying never.

16 MR. ARRINGTON: The Court should not
17 grant intervention in this case. Because there
18 is no right to intervene in this statute in this
19 particular case.

20 Come the federal case, it's a different
21 issue because they raised their RCRA and they
22 raised their Clean Water Act, which is, in this
23 case, in the federal court. And in federal



1 court, they will get their chance to raise thi

2 But that's not today.

3 Is there any other questions Your Honor
4 has?

5 THE COURT: No. I think the briefing
6 has been excellent, and the presentations have
7 been excellent too.

8 MR. BROCKSTEDT: Thank you, Your Honor.
9 Chase Brockstedt. I will do my best to be
10 brief. And I appreciate the fact that the Court
11 has read all the papers very well.

12 It's been interesting what has been
13 argued in the papers and what you did not hear
14 today, Your Honor, and also what you did hear.

15 Mr. Arrington -- I will pick up where we
16 left off. Mr. Arrington said three times on the
17 record, you need to focus on the complaint.
18 Mountaire and DNREC are not coming here asking
19 you to sign the complaint. You need to focus on
20 what it is they are asking you to sign, which
21 they are asking you to sign a settlement
22 agreement which disposes of the federal claims.

23 Don't take my word for it.



1 Mr. Arrington's exact quote when you asked what
2 was going to happen up there, we hope the judge
3 there will say they are moot. This is an end
4 run around the process, Your Honor.

5 You also haven't heard a single argument
6 as to inadequate representation, as to how DNREC
7 is representing the interests of the thousand
8 people or so that are affected by this between
9 Mr. Nidel's clients and our clients.

10 You almost have to go back to a balance
11 of the scales, Your Honor. What's the downside
12 of not letting us into this case and having a
13 voice versus the downside of keeping us out?
14 Well, we've got a complaint that alleges federal
15 claims and a release that resolves them; yet
16 we've got arguments that this is limited to a 27
17 upset only involving state claims.

18 We've got a consent decree, which
19 according to leading experts in the country,
20 touches on a fraction of the problems here.
21 Ms. Scott argued that there is, oh, there is
22 this public process. There will be construction
23 permits. There will be operational permits.



1 And they can have their time to intervene or t
2 provide public comment then.

3 Your Honor, they are coming to this
4 court asking you to resolve and settle an
5 enforcement action. In addition to the section
6 that you pointed out, Your Honor, which is an
7 exhibit to our reply brief -- and I completely
8 disagree with what Ms. Scott represented to the
9 Court.

10 Delaware, quote, Delaware also provides
11 for public participation in the enforcement
12 process by allowing intervention as a right in
13 any civil or administrative action, as well as
14 citizen suits consistent with RCRA, not limited
15 to citizen suits from RCRA.

16 Your Honor, the regulations from the
17 Code of Federal Regulations that we cited in our
18 papers -- again, I know that you've read them,
19 but I'm going to repeat them for the record,
20 Your Honor. 40 CFR, Section 123.27. This is
21 related to enforcement authority for water
22 programs. It requires, quote, published notice
23 of and provide at least 30 days for public



1 comment on any proposed settlement of a state
2 enforcement action, not a construction permit,
3 not an operational permit.

4 40 Code of Federal Regulations 239.9
5 with regard to open dumping, quote, provide
6 notice and opportunity for public involvement in
7 all proposed settlements of civil enforcement
8 actions. We are not talking about a
9 construction permit. We are not talking about
10 an operational permit.

11 40 Code of Federal Regulations 27.16 as
12 it relates to the enforcement authority for
13 solid wastes, quote, published notice of and
14 provide at least 30 days for public comment on
15 all proposed settlements of civil enforcement
16 actions. These also require them not to oppose
17 intervention. So to get up here and to say
18 that, oh, there is a process, there is a time
19 for notice and comment is just completely false,
20 Your Honor.

21 The scope of the settlement is not state
22 law. I appreciate the representations that are
23 being made today. I take Ms. Scott at her word



1 that that's what was intended. You just have
2 read the document. That's not at all what it is
3 doing.

4 We heard that there were these meetings
5 with Mountaire and their experts and our experts
6 and all these folks were getting together. How
7 come we can't be a part of that process? How
8 come we can't be let in? Please, let us into
9 this case, Your Honor.

10 In plaintiff interveners' papers we
11 don't reference our tort case, which is a class
12 action case, whatever you want to call it, Your
13 Honor. We don't reference that in our papers.
14 When I stood up here today, I didn't talk about
15 it one time. It's all that they want to talk
16 about.

17 But let me tell you what the effect of
18 this can be. Just like Mr. Arrington said, that
19 walking into the federal court with this court's
20 order approving this settlement agreement making
21 it a court order hopefully will moot that case
22 there. You can bet your bottom dollar they are
23 going to walk into the class action case at some



1 point in time and they are going to say, Your
2 Honor, you've heard from the plaintiffs, and
3 they think that the plant needs to be
4 overhauled, and we need to have a lagoon system
5 with 90 to 120 days of a holding period, and we
6 need to have more acreage for our spray
7 irrigation or whatever it is, or we need to
8 address air.

9 What you are going to hear, Your Honor,
10 you are going to hear that DNREC is the agency
11 that is there to enforce these regulations.
12 DNREC and Mountaire have worked together to
13 craft a settlement agreement. The court blessed
14 it. Your Honor, we've got a court order here.
15 You can't tell us to do anything more because
16 this issue has been addressed. That's what I
17 heard today.

18 It's not what we are arguing on papers.
19 I didn't argue it on mine. But that's what you
20 are hearing today, Your Honor. We hope it moots
21 the federal court case and the tort case and the
22 class action and the tort case and the tort
23 case. That's where you are going to hear it



1 again, Your Honor.

2 They want you to sign this settlement
3 agreement. They want you to rubber stamp it.
4 Ms. Scott talked about evidence. The standard
5 that she was talking about is substantial
6 evidence in the record. What is the substantial
7 evidence in the record that the consent decree
8 as written is going to solve a single problem?

9 Thank you, Your Honor. I appreciate
10 your time today.

11 MR. NIDEL: Your Honor, I realize it's
12 just about the witching hour for me. Just very
13 briefly, a few quick points.

14 We've heard repeatedly from DNREC,
15 particularly, that this was focused on the
16 upset. It's a focused enforcement, that it's
17 all about the September upset.

18 But if you read the release language,
19 that is not -- you know, my note is they sold
20 the farm. Okay. They gave everything to
21 Mountaire. They gave them a release for
22 everything, including federal claims.

23 THE COURT: Do you mind reading it into



1 the record?

2 MR. NIDEL: Your Honor, no problem.

3 THE COURT: Just go a bit slowly,
4 please.

5 MR. NIDEL: It says, "Mountaire's
6 satisfaction of its obligations under this
7 consent decree shall resolve and release
8 Mountaire of any and all liability of Mountaire
9 to DNREC for its failure in the past and for the
10 period from the entry of this consent decree
11 until the system upgrade is completed to meet
12 the effluent limitations and other conditions
13 contained in this spray permit and to satisfy
14 the compliance requirements in the land
15 application permits, including but not limited
16 to any such liability that might be imposed for
17 violations alleged in the NOV, such liability
18 that might be imposed for alleged contribution
19 to the past or present handling, storage,
20 treatment, transportation or disposal of a solid
21 waste that may present an imminent and
22 substantial endangerment to health or the
23 environment, and such liability that might be



1 imposed as a result of alleged disposal into a
2 open dump as defined under 7 Del C, Chapter
3 6002(35) and 42 U.S.C., Section 6403(14), and
4 such liability that might be imposed as a result
5 of discharge of pollutants into waters of the
6 state and United States through surface water
7 and hydro-geologic connection of Mountaire's
8 contaminated groundwater with Swan Creek, Indian
9 River and Indian River Bay."

10 That reference is clearly both RCRA by
11 specific reference and the Clean Water Act by
12 reference to the waters of the state and of the
13 United States.

14 So what they are looking for is, as
15 Mr. Brockstedt just said, a pass to go to the
16 federal court to say those federal claims are
17 also mooted by this. And, in fact, what DNREC
18 will be doing is selling their right to enforce
19 that. And so Mountaire could go on its own and
20 say, federal court, DNREC can't come after us
21 here. They have given us a free pass on these
22 federal statutes that are in your court.

23 So what's being released, that needs to



1 be what's the focus here. That's why we are
2 here and that's what our concern is and why we
3 are seeking to be involved.

4 With respect to a private right of
5 action, that's been raised in the papers.
6 That's not a requirement of Rule 24. We heard
7 counsel for the other side, both of them today,
8 raise this question of private right of action.
9 Intervention requires an interest. It requires
10 inadequate representation. That's it. There is
11 no need for a private right of action to
12 distinguish the federal claims and the state
13 claims. Here we are in state court.

14 We heard DNREC say they could have used
15 other tools, but they chose this. They chose to
16 file a lawsuit. The lawsuit in this court is
17 governed by Rule 24. We can intervene. They
18 didn't have to file a lawsuit. They could have
19 negotiated a consent decree outside. They could
20 have negotiated a deal.

21 However, they chose to file a lawsuit, I
22 would argue cynically, so that they could stop
23 the interveners from pursuing their own lawsuit



1 that we had noticed. But even without that
2 cynical, they didn't have to take that approach.

3 The problem for us, who noticed the
4 lawsuit in its original intent, is that we are
5 now prohibited from bringing our own lawsuit.
6 So all we can do is participate in this process.
7 We have this right of intervention as the
8 exhibit from Mr. Brockstedt's briefing pointed
9 out. The state has represented that consistent
10 with RCRA, that we should also be given an
11 automatic right of intervention in a state case.
12 That's what we are seeking here.

13 Ms. Scott brought up the right of appeal
14 after these things go down the road. But that's
15 going to be based on the standards that are set
16 forth in this agreement that they are asking the
17 court to sign.

18 So we can appeal whether they
19 constructed something by the time that they did
20 or, you know, how high it is. But the standard,
21 which is very ill-defined in this agreement, is
22 being set forth here. And that's what they are
23 asking the court to order.



1 And the final point that I would like
2 make just after noon here is the point raised by
3 Mr. Arrington, that he questions whether we have
4 an interest in the action. We noticed this
5 action. We represent people that live in the
6 middle of these spray fields. We had a client,
7 Gina Burton, that was here this morning that
8 witnessed this upset, including the spraying of
9 guts and debris onto the land that surrounds her
10 house.

11 So clearly we have an interest in this
12 action. There can be no question as to whether
13 we have an interest. The only question is
14 whether we meet the other prongs of Rule 24.
15 And I think that's clear.

16 So with that, Your Honor, I thank you.
17 And I will rest.

18 THE COURT: I want to thank you very
19 much. I'm going to reserve decision. I thought
20 both sides were very professional, civil. And
21 it's a pleasure to actually be a judge to be
22 able to hear such fine presentations by both
23 sides. Thank you very much.



1 (Whereupon, the proceedings in the
2 above entitled matter were concluded.)

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C E R T I F I C A T E

I, ANNE L. SWOYER, RPR, CCR, an Official
Court Reporter of the Superior Court of the
State of Delaware, do hereby certify the above
and foregoing Pages 3 to 93 to be a true and
accurate transcript of the proceedings therein
indicated on November 20, 2018, as was
stenographically reported by me and reduced to
typewriting under my direct supervision, as the
same remains of record in the Sussex County
Courthouse at Georgetown, Delaware.

This certification shall be considered
null and void if this transcript is disassembled
in any manner by any party without authorization
of the signatory below.

/s/Anne L. Swoyer
Anne L. Swoyer, RPR, CCR

11/29/2018
Date

ANNE L. SWOYER, RPR, CCR
OFFICIAL COURT REPORTER